

EXHIBIT 5

1 IN THE UNITED STATES DISTRICT COURT
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3 IN AND FOR THE DISTRICT OF DELAWARE
4

5 APPLE INC.,)
6 Plaintiff,)
7 vs.) Case No.
8) 22-CV-1377-MN-
9) JLH
10)
11 MASIMO CORP, et al.,) 22-CV-1378-MN-
12) JLH
13)
14 Defendants.)
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16 TRANSCRIPT OF MOTION HEARING
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18 MOTION HEARING had before the Honorable
19 Jennifer L. Hall, U.S.M.J., in Courtroom 2B on
20 the 15th of June, 2023.
21

22 APPEARANCES
23

24 POTTER ANDERSON & CORROON LLP
25 BY: DAVID MOORE, ESQ.
17 BINDU PALAPURA, ESQ.
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19 - and -
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21 DESMARAIS LLP
22 BY: KERRI-ANN LIMBECK, ESQ.
23 JORDAN MALZ, ESQ.
24 JAMIE KRINGSTEIN, ESQ.
25

22 - and -
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24 WILMERHALE
25 BY: JENNIFER MILICI, ESQ.
17 MARK FORD, ESQ.
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21 Counsel for Plaintiff
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1 (Appearances continued.)
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4 PHILLIPS MC LAUGHLIN & HALL P.A.
5 BY: JOHN PHILLIPS, ESQ.
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8 - and -
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11 KNOBBE MARTENS
12 BY: ADAM POWELL, ESQ.
13 STEVE LARSON, EQ.
14 BRIAN HORNE, ESQ.
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17 Counsel for Defendants
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1 THE COURT: So we're here today to
2 hear motions in two cases. One is *Apple versus*
3 *Masimo and Sound United*, and that's
4 22-CV-1377-JLH. And the other is also *Apple*
5 *versus Masimo and Sound United*. That's
6 22-1378.

7 Let's have appearances starting with
8 Plaintiff.

9 MR. MOORE: Good morning, Your Honor.
10 David Moore from Potter Anderson on behalf of
11 Apple. I'm joined by my partner Bindu
12 Palapura. We're joined by our co-counsel from
13 Desmarais Kerri-Ann Limbeck, Jordan Malz, and
14 Jamie Kringstein. And from WilmerHale we're
15 joined by Jennifer Milici and Mark Ford. And
16 from Apple, Natalie Poe and Megan
17 Thomas-Kennedy.

18 THE COURT: Hello. Good morning,
19 everyone.

20 MR. PHILLIPS: Good morning, Your
21 Honor. Jack Phillips of Phillips, McLaughlin,
22 and Hall. With me in the courtroom are Steve
23 Larson, Brian Horne, and Adam Powell from
24 Knobbe Martens.

25 THE COURT: Good morning, everyone.

1 claims about unilateral refusals to deal would
2 be -- would have to go to discovery and would
3 be the subject of litigation and *Trinko* and
4 other case law explains why that shouldn't be.
5 This is unilateral conduct we're talking about,
6 and as you recognize in *Simon* and other cases,
7 there's a chilling effect if we allow claims
8 that don't have a plausible antitrust theory to
9 go forward because they happen to be thrown it.
10 And it encourages plaintiffs to throw in
11 everything they think of no matter how
12 plausible so that they can impose incredible
13 discovery allegations on the defendant.

14 THE COURT: Understood. And again,
15 I'm thinking out loud here. I think what's
16 challenging for the Court in this particular
17 case given these particular parties and their
18 history of litigation against each other,
19 arguments about burdens of discovery are maybe
20 taken with a degree of skepticism, and I
21 don't -- but I get it. I get what you're
22 saying.

23 MS. MILICI: If I could just respond
24 to that point because I think we've been
25 engaging in discovery. They served discovery

1 requests. Some of the requests are asking for
2 things like, basically, every app store review
3 that Apple has ever done based on the thinnest
4 of allegations. That hasn't been the subject
5 of discovery in any litigation between the
6 parties. That's brand new litigation, brand
7 new discovery and not suggested by any of the
8 allegations in the complaint.

9 I will also say that counsel got up here
10 and talked about this supposed theory they
11 steal trade secrets. That's being litigated in
12 the Central District of California. That
13 cannot be relitigated here. The Central
14 District of California case, when it has a
15 decision, it will be res adjudicata. It's not
16 an antitrust injury anyway, but certainly they
17 don't get a second bite of the apple. Judgment
18 as a matter of law was granted against them in
19 some of the claims by Judge Tilghman, and
20 jurors voted six to one among them on the
21 others until a mistrial was declared. Those
22 issues are going to be decided there. They're
23 not antitrust issues to begin with, but they
24 certainly don't get to come here and repackage
25 them as antitrust violations and get a

1 own invalidity contentions to then argue that
2 someone specific actually committed some sort
3 of misconduct that would rise to the heightened
4 pleading standard for inequitable conduct here.

5 THE COURT: All right. Thank you
6 very much.

7 If you feel like you need to respond, you
8 can because we did give them some extra time,
9 but there's no requirement.

10 MR. LARSON: First of all, I really
11 disagree with how you characterize our
12 discovery. We didn't serve any requests
13 remotely like that that I recall. And as Your
14 Honor pointed out, that can be handled on
15 discovery to the extent the requests are too
16 broad.

17 Second, on particular theories of
18 antitrust, I don't think this is a good forum
19 to decide the economics of our theories because
20 Apple primarily argues bright-line rules. We
21 argued about the bright-line rules. We think
22 to the extent particular theories are going to
23 be addressed, they should be addressed with
24 expert testimony on the economics, if anything
25 in summary judgment, and you should look at the

1 conduct as a whole, which will be developed at
2 that time.

3 And third, Apple mentioned that it
4 approved our health app, but that was after we
5 filed a lawsuit, and we mentioned and show in
6 our complaint a repeated pattern, and certainly
7 the fact the Apple eventually allowed the app
8 doesn't undo the harm at the critical moment of
9 our launch, and certainly doesn't undo the harm
10 to competition as a whole.

11 THE COURT: Just to make sure I
12 understand, sorry, there was a delay in Apple
13 approving on the App Store, but the app is
14 approved now?

15 MR. LARSON: The app is approved now,
16 but the only thing I would say in our complaint
17 is not just that there was a delay or they
18 refused to approve it, it's a pattern we see
19 where they're seeking confidential information
20 from it, and they use Section 9.3 of the
21 agreement that we discussed in our complaint,
22 which says they can use whatever confidential
23 information they get for whatever purpose. And
24 you see a pattern of trying to get the
25 confidential information. They're directly

1 competing with the Health Watch product.

2 THE COURT: I understand we're going
3 outside the pleadings now, but I'm trying to
4 understand what's going on here. You didn't
5 give them the confidential information?

6 MR. LARSON: We did. We resisted
7 giving them confidential information.

8 THE COURT: They had it from the
9 other case; right?

10 MR. LARSON: Depending on what
11 confidential information -- we were very
12 careful about making sure Apple itself did not
13 have it. And like I said, this is not just us.
14 It's also Alive Core. In that case, Alive
15 Core -- Apple was not allowed at all, so
16 there's a pattern here. We think, certainly,
17 it's a part of the overall scheme and part of
18 the overall conduct that we think would be
19 relevant here in providing analysis of.

20 THE COURT: You all reminded me that
21 I've written a lot about antitrust cases, but
22 I'm still newer to this than I know a lot of
23 you are. Because this is an attempted
24 monopolization claim, is it relevant to intent
25 even though it didn't cause any harm?

1 MR. LARSON: First of all, it would
2 be relevant to intent, absolutely. Intent is
3 also shown by conduct in antitrust cases, but
4 certainly actual intent, evidence taken during
5 discovery, the actions they engaged in to try
6 to block us would absolutely be relevant.

To clarify, we are also asserting monopolization. Both monopolization and alternative attempt at monopolization, the theory being that even if they don't have market share now for us to assert that they're trying to maintain or bolster the monopoly power, the conduct is such that there's a dangerous probability that if the scheme were successful, they would attain that monopoly power, that market share.

19 MR. LARSON: In the *Garden* case it
20 was both monopolization and attempted
21 monopolization. And in *TransWeb*, it was
22 attempted monopolization, which may be what
23 Your Honor is thinking of. And certainly the
24 theory the harm that will result if the scheme
25 is successful is particularly powerful in the

C E R T I F I C A T E

STATE OF DELAWARE)
COUNTY OF NEW CASTLE) ss:

4 I, Deanna L. Warner, a Certified
5 Shorthand Reporter, do hereby certify that as
6 such Certified Shorthand Reporter, I was
7 present at and reported in Stenotype shorthand
8 the above and foregoing proceedings in Case
9 Number 22-CV-1377-MN-JLH, *APPLE INC. Vs. MASIMO*
10 *CORP, et al.*, heard on June 15, 2023.

11 I further certify that a transcript of
12 my shorthand notes was typed and that the
13 foregoing transcript, consisting of 56
14 typewritten pages, is a true copy of said
15 **MOTION HEARING.**

Deanna L. Warner, CSR, #1687
Speedbudget Enterprises, LLC